tives allotted to a state pursuant to the 14th amendment, was held not germane to reapportionment legislation.(9)

§ 2.8 To a civil rights bill, an amendment establishing a "Commission on Voting" to report the number of citizens in each state denied the right to vote and to calculate a new apportionment of Representatives on the basis of such findings, was ruled out as not germane.

On Feb. 4, 1964, while the House was considering title I of the Civil Rights Bill of 1963, an amendment was offered to establish a Commission on Voting to report the number of citizens in each state denied the right to vote and to calculate a new apportionment of Representatives on the basis of such findings.(10)

Chairman Eugene J. Keogh, of New York, ruled that the amendment was not germane, citing the precedent of July 19, 1956, wherein Chairman Aime J. Forand, of Rhode Island, held not germane a similar amendment to a similar bill.(11)

§ 3. Districting Requirements; Duty of States

After Congress has allocated a certain number of Representatives to a state following a census,(12) some method must be appointed by the state legislature for the election of such Representatives. The power of a state legislature under article I, section 4 of the U.S. Constitution, to divide the state into districts to elect and to be represented by Members of the House is unquestioned, although the way in which the state districts itself may be directed by federal statute or by court order. A state must redistrict itself to reflect changes in its allocated representation in the House as well as population shifts indicated by the census.(13)

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9. See also 8 Cannon's Precedents § 2996 for a ruling that, to a bill providing for reapportionment of Representatives in Congress, an amendment authorizing redistricting of states in accord with such apportionment was not germane.

10. 110 CONG. REC. 1899, 88th Cong. 2d Sess.

11. For unsuccessful proposals to create a joint congressional committee to implement the 14th amendment of the U.S. Constitution by providing for reduction in representation for denial of voting rights, see S. 2709, 85th Cong. 1st Sess. (1957) and S. 1084, 86th Cong. 1st Sess. (1959).

12. See 2, supra.

13. See § 1, sup a, for a discussion of the delineations of power between Con-

The first attempt by Congress to exercise its constitutional power over state districting under article I, section 4, providing for preemption of state law by federal law over election procedure, was undertaken in 1842, when Congress provided that states with more than one Representative should establish single-member districts of contiguous territory.[14] The single-member districting requirement was eliminated in 1850[15] but reinstated in 1862.[16] In 1872, Congress added a requirement that districts be as equal in population as practicable[17] and in 1901 a requirement was added that districts be compact as well as contiguous.[18] The three requirements—of single-member districts, of contiguity, and of compactness—were consolidated in the Reapportionment Act of 1911.[19]

Between 1842 and 1911 Congress did not enforce the statutory provisions mandating state districting requirements for congressional elections. In 1842, 1901, and 1910,[20] the House rejected challenges to rights to seats based on state noncompliance with the federal districting standards. There was, in addition, some question as to the power of the courts to enforce the requirements for congressional districts.[1]

When the Apportionment Act of 1929,[2] establishing a permanent procedure for apportionment of seats in the House, was enacted, none of the prior districting requirements were included therein. Following that legislative action, the Supreme Court in a 1932 case ruled the federal districting standards no longer operative.[3]

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gress, the states, and the courts over the census, apportionment, and congressional districting.

See also, Schmeckebier, Congressional Apportionment (Washington, 1941); Celler, Congressional Apportionment—Past, Present and Future, 17 Law and Contem. Prob. 286 (1952); Hearings on Congressional Districting (H.R. 8953 and related proposals), subcommittee No. 5, House Committee on the Judiciary, 92d Cong. 1st Sess.

14. Act of June 25, 1842, 5 Stat. 491.

15. Act of May 23, 1850, 9 Stat. 428.

16. Act of July 14, 1862, 12 Stat. 572.

17. Act of Feb. 2, 1872, 17 Stat. 28.

18. Act of Jan. 16, 1901, 31 Stat. 733.

19. Act of Aug. 8, 1911, 37 Stat. 13.

20. 1 Hinds' Precedents §§ 310, 313; 6 Cannon's Precedents § 43.

1. See the following language in *Oregon* v *Mitchell*, 400 U.S. 112, 121 (1970): "And in Colgrove v. Green, 328 U.S. 549 (1946), no Justice of this court doubted Congress' power [under article I, § 4] to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting."

2. Act of June 18, 1929, 46 Stat. 26.

3. *Wood* v *Broom*, 287 U.S. 1 (1932). See also *Exon* v *Tiemann*, 279 F Supp 603 (D. Neb. 1967).

In 1946, when Illinois voters sued in federal court to enjoin the holding of a forthcoming congressional election, claiming constitutional and statutory violations of districting requirements, the Supreme Court affirmed the dismissal of the case because the statutory requirements had been superceded by the 1929 Reapportionment Act, and because the issue presented a nonjusticiable political question.[4] The Court pointed to article I, section 4 of the Constitution as conferring "upon Congress exclusive authority to secure fair representation by the states in the popular House" and stated that if Congress failed in that respect, "the remedy ultimately lies with the people."[5]

In 1964, the Supreme Court invalidated for the first time, in *Wesberry* v *Sanders,* a Georgia congressional districting statute which accorded some districts more than twice the population of others.[6] The political-question doctrine of *Colgrove* v *Green*[7] was overruled in reliance on the state apportionment case of *Baker* v *Carr*.[8] The Court held in *Wesberry* that the command of article I, section 2 of the Constitution that Representatives be chosen by the people of the several states means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's.[9] The Court did not establish specific requirements for congressional districts, stating that although it may not be possible to draw them with a mathematical precision, equal representation for equal numbers of people was the fundamental goal of redistricting.[10]

The Supreme Court decision in *Wesberry* impelled Congress to act

4. *Colgrove* v *Green,* 328 U.S. 549 (1946).

5. *Id.* at p. 554.

6. 376 U.S. 1 (1964). See also the companion case, *Wright* v *Rockefeller,* 376 U.S. 52 (1964) (failure to show racially discriminatory districting in New York).

7. 328 U.S. 549 (1946).

8. 369 U.S. 186 (1962).

9. 376 U.S. 1 at pp. 7, 8 (1964).

10. The court drew on the Constitutional and Ratifying Conventions to demonstrate that the purpose of the "Great Compromise" was to afford equal representation for equal numbers of people in the House of Representatives. *Id.* at pp. 13, 18.

By 1968, the majority of congressional district lines had been redrawn, with only nine states having a population deviation in excess of 10 percent from the state average, and 24 states having no deviation as large as five percent. McKay, Reapportionment: Success Story of the Warren Court, 67 Mich. L. Rev. 223, 229 (1968).

upon federal redistricting requirements, and in 1967 a bill was enacted into law requiring that districts be limited to a single member.(11) No other congressional requirements were established, although attempts were made to legislate allowable percentage variances of congressional districts.(12)

In 1969, the Supreme Court reenforced the *Wesberry* opinion by invalidating congressional redistricting in Missouri, where districts were several percentage points above or below the mathematical ideal. The Court would allow only "the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which Justification is shown"(13) and stated that economic, social, or political factors do not suffice for justification of variances.(14) The Court added that districting could be based on eligible voter population rather than total population, if accurately and completely computed, and that population shifts over a 10-year period could be anticipated in redistricting but findings as to such shifts must be thoroughly documented and systematically applied statewide.(15) In other decisions on congressional redistricting the Supreme Court has required a state showing of good faith effort to achieve precise mathematical equality among all districts,(16) and has applied a test of practicability, under the particular circumstances of the state involved, in drawing districts.(17)

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11. See § 3.3, infra.

The single-member district requirement of 2 USC § 2c removed the prior command of 2 USC § 2a(c) that elections be held at-large upon legislative failure to redistrict. *Preisler* v *Secretary of State,* 279 F Supp 952 (W.D. Mo. 1967), aff'd, 394 U.S. 526 (1969), rehearing denied, 395 U.S. 917 (1970).

12. See § 3.3, infra. For other attempts to enact federal districting standards, and the procedure by which their consideration was governed, see §§ 3.43.7 infra.

13. *Kirkpatrick* v *Preisler,* 394 U.S. 526 (1969). See also the companion case, *Wells* v *Rockefeller,* 394 U.S. 542 (1969) (state must demonstrate good faith effort to achieve precise mathematical equality among congressional districts).

14. *Kirkpatrick* v *Preisler,* 394 U.S. 526 (1969).

15. *Id.* See also *Lucas* v *Rhodes,* 389 U.S. 212 (1967) (per curiam), where the court affirmed the finding of unconstitutionality applied to congressional redistricting in Ohio where unofficial but incomplete post-census population figures were taken into account.

16. *Wells* v *Rockefeller,* 394 U.S. 542 (1969) (New York State).

17. *Dinis* v *Volpe,* 264 F Supp 425 (D. Mass. 1967), aff'd, 389 U.S. 570 (1968) (per curiam).

The allowable population variance in percentage points for any district from the state average remains undefined. However, it has been held that a state plan providing for some districts with twice the population of others in the same state,[18] or which vary 25 percent from the state population norm,[19] is unconstitutional. A variance of 10 percent to 15 percent has been both accepted and rejected by the Court.[20]

On the subject of "gerrymandering," or the drawing of congressional district lines with the motivation or affect of benefiting an incumbent, political party or racial group,[1] the Supreme Court has stated that citizens challenging a congressional redistricting act on the grounds of racial discrimination must show either racial motivation or actual districting along racial lines.[2]

Some disputes have arisen concerning the validity under state law of redistricting action taken by the states. Following the 1930 census, a series of cases arose in which the right of the Governor to veto a reapportionment bill was questioned. The U.S. Supreme Court ruled that the state function to redistrict itself for congressional elections was legislative in character and therefore subject to gubernatorial veto under the same terms as other state legislation.[3]

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18. *Wesberry* v *Sanders,* 376 U.S. 1 (1964).

19. *Dinis* v *Volpe,* 389 U.S. 570 (1968) (per curiam).

20. See the dissenting opinion of Justice Harlan in *Rockefeller* v *Wells,* 389 U.S. 421 (1967) (per curiam), stating that the Court had left the lower courts and Congress without guidance for congressional redistricting. See also his dissenting opinions on the same subject in *Grills* v *Branigin,* 390 U.S. 932 (1968) (stay denied) and *Lucas* v *Rhodes,* 389 U.S. 212 (1967) (per curiam).

1. See *Guide to Congress,* pp. 502, 503, 505, 506, Congressional Quarterly Inc. (Washington 1971).

Districting requirements for special election to fill vacancy, § 9, infra.

2. *Wells* v *Rockefeller,* 376 U.S. 52 (1964). The Court has more pointedly addressed gerrymandering in districting for state and local elective officials. See, for example, *Gomillion* v *Lightfoot,* 364 U.S. 339 (1960).

See also Edwards, The Gerrymander and "One Man, One Vote," 46 N.Y.U.L. Rev. 879 (1971).

3. See *Smiley* v *Holm,* 285 U.S. 355 (1932); *Koenig* v *Flynn,* 285 U.S. 375 (1932); *Carroll* v *Becker,* 285 U.S. 380 (1932).

In *Grills* v *Branigin,* 284 F Supp 176 (D. Ind. 1968), aff'd, 391 U.S. 364 (1969), a federal court held that only the state general assembly had the power to create congressional districts, an elections board lacking legislative power under the state and federal constitutions.

Congressional Standards for Districting

§ 3.1 In transmitting the 1950 census results to Congress, the President recommended the adoption by Congress of federal standards for congressional districting.

On Jan. 9, 1951, the President transmitted pursuant to statute the results of the 1950 census to Congress.[4] Within his message on the census he included an appraisal of the wide discrepancies in congressional districting among the states and recommended that Congress re-establish former statutory requirements of compact, contiguous single-member districts with as nearly as practicable an equal number of inhabitants. The message also supported Congress' power, under article I, section 4 of the Constitution, to establish congressional districting requirements and to compel compliance therewith.[5]

4. 98 CONG. REC. 114, 82d Cong. 1st Sess.

5. Legislation in response to the President's message was introduced by Emanuel Celler, of New York, Chairman of the Committee on the Judiciary, in the 82d and subsequent Congresses but was not acted upon. See, e.g., H.R. 2648, 82d Cong. 1st Sess. (1951); H.R. 6156, 82d Cong. 2d Sess. (1952); H.R. 6428, 83d Cong. 1st Sess. (1953); H.R. 8239, 84th Cong. 2d Sess. (1956).

§ 3.2 The Committee on the Judiciary has recommended in reports on districting legislation that Congress establish specific guidelines in the absence of judicial standards.

On several occasions since the Supreme Court's entry into the field of congressional districting,[6] the Committee on the Judiciary, which has jurisdiction over congressional districting,[7] has submitted reports on proposals to establish standards for congressional districting by the states. On those occasions, the committee has recommended that such guidelines be adopted due to the failure of the judiciary to prescribe definite standards.[8]

6. See *Wesberry* v *Sanders*, 376 U.S. 1 (1964).

7. Rule XI clause 13(b), *House Rules and Manual* § 707 (1973).

8. H. REPT. NO. 191, Committee on the Judiciary, 90th Cong. 1st Sess. (1967); H. REPT. NO. 486, Committee on the Judiciary, 92d Cong. 1st Sess. (1971); H. REPT. NO. 140, Committee on the Judiciary, 89th Cong. 1st Sess. (1965). Justice Harlan, in his dissenting opinion in *Rockefeller* v *Wells*, 389 U.S. 421 (1967) (per curiam), cited the latter report for the proposition that the Court had left both the lower courts and Congress without guidance in drawing congressional district lines.

§ 3.3 Except to require single-member congressional districts, Congress has declined since 1929 to set standards for congressional districting by the states.[9]

In 1967, Congress required that all states establish a number of districts equal to the number of Representatives to which each such state is so entitled, with one Representative to be elected from each such district.[10]

The Congress has declined to set any other standards as to congressional redistricting by the states.[11]

Consideration of Districting Legislation

§ 3.4 Legislation regulating congressional redistricting has been considered in the Committee of the Whole.[12]

§ 3.5 Legislative proposals setting standards for congres-

9. Congress has affirmed that it has the constitutional power to establish congressional districting requirements. See 111 CONG. REC. 5080, 89th Cong. 1st Sess., Mar. 16, 1965; 113 CONG. REC. 11064–71, 90th Cong. 1st Sess., Apr. 27, 1967.

Prior to 1929, Congress required that the states district themselves so as to produce compact, contiguous, and single-member congressional districts. See the act of Aug. 8, 1911, Ch. 5, § 30, 37 Stat. 14. That act, which was formerly codified as 2 USC § 3, expired by its own limitation upon the enactment of the Reapportionment Act of June 18, 1929, Ch. 28, 46 Stat. 21, as amended, 2 USC § 2a. See *Wood* v *Broom*, 287 U.S. 1 (1932), where the Supreme Court held that the 1911 act had become inoperative upon the enactment of the 1929 act.

10. Pub. L. No. 90–196, 81 Stat. 581, Dec. 14, 1967 (2 USC § 2c).

Districting legislation in the 90th Congress as originally proposed by the House Committee on the Judiciary and as passed by the House provided not only for single-member districts but also for compactness and contiguity, and fixed a maximum percentage variance among districts. 113 CONG. REC. 11089, 90th Cong. 1st Sess., Apr. 27, 1967. The Senate desired a smaller and more immediate percentage variance, and never reached agreement with the House on the bill. 113 CONG. REC. 31712, 90th Cong. 1st Sess., Nov. 8, 1967.

11. See, for example, the legislative history of H.R. 5505, 89th Cong. 1st Sess. (1965), and H.R. 8953 and 10645, 92d Cong. 1st Sess. (1971); see also the announcement of the Chairman of the Committee on the Judiciary describing committee action taken on a redistricting bill, 117 CONG. REC. 28945, 28946, 92d Cong. 1st Sess., Aug. 2, 1971, and the committee's report, H. REPT. NO. 92–486, 92d Cong. 1st Sess. (1971).

12. 113 CONG. REC. 11071, 90th Cong 1st Sess., Apr. 27, 1967; 111 CONG. REC. 5084, 89th Cong. 1st Sess., Mar. 16, 1965.

sional districting have been considered by the House pursuant to a special rule or order limiting amendment of the proposal.

On Mar. 16, 1965, Howard W. Smith, of Virginia, Chairman of the Committee on Rules, offered House Resolution 272, providing that H.R. 5505, on federal standards for congressional districting, be considered under limited power to amend.(13) After some debate, a "modified closed rule" was adopted by the House.(14)

On Apr. 27, 1967, the House adopted House Resolution 442, providing for a "closed" rule on H.R. 2508, requiring the establishment of congressional districts of contiguous and compact territory, and for other purposes.(15) Mr. B.F. Sisk, of California, a member of the Committee on Rules, explained that the closed rule was proposed because of the complicated provisions of the legislation and because of the urgency of passage, although closed rules were not normally considered for such legislation.(16) Opposition to the closed rule was voiced by Mr. John Conyers, Jr., of Michigan, and Mr. Richard L. Ottinger, of New York, because of the serious constitutional and political issues raised by the bill.(17)

§ 3.6 To a joint resolution proposing a constitutional amendment relating to the election of the President and Vice President by popular vote rather than through the electoral college process, an amendment pertaining to standards for congressional districting was ruled not germane.(18)

On Sept. 18, 1969, the House was considering in the Committee of the Whole a joint resolution proposing an amendment to the Constitution providing for a popular vote rather than an electoral vote for the offices of President and Vice President.(19)

An amendment was offered by Mr. Thaddeus J. Dulski, of New York, requiring that the states establish compact and contiguous single-member districts for con-

13. 111 CONG. REC. 5080, 89th Cong. 1st Sess.

14. *Id.* at p. 5084.

15. 113 CONG. REC. 11071, 90th Cong. 1st Sess.

16. *Id.* at pp. 11064, 11065.

17. *Id.* at pp. 11069, 11070.

18. An amendment providing for the redistricting of states has also been held not germane to a bill dealing with reapportionment. 71 CONG. REC. 2364, 2444, 2445, 71st Cong. 1st Sess., June 6, 1929.

19. 115 CONG. REC. 25966, 91st Cong. 1st Sess. (H.J. Res. 681).

gressional elections. Chairman Wilbur D. Mills, of Arkansas, ruled that the amendment was not germane to the joint resolution, since nothing in the resolution pertained to the apportionment or election of Representatives.[20]

Unequal Representation in Primary

§ 3.7 The House refused to overturn an election in a state with a "county unit" primary election system, where less populous counties were entitled to a disproportionately large electoral vote for nominees.

On Apr. 27, 1948, the House adopted without debate House Resolution 553, dismissing the Georgia election contest of *Lowe* v *Davis.*[1]

Parliamentarian's Note: The House in this case refused to invalidate the Georgia "county unit" system for primaries, requiring use of county electoral votes rather than popular votes for choosing nominees. Under the system each candidate was required to receive a majority of county unit votes for nomination, and unit votes were allotted in favor of less populous counties rather than strictly by population.[2]

§ 4. Failure of States to Redistrict

Congressional redistricting is a legislative function for the several states.[3] The failure of a state in this regard may arise either through neglect to pass any new districting legislation after reallocation of House seats or population changes reflected in the census, or through enactment of legislation which does not satisfy the requirements of the Constitution, federal statutes, or state law.[4]

Where a state's districting plan is defective, the remedy lies either with Congress or with the courts. Since Congress not only has the

20. *Id.* at pp. 25983, 25984.

1. 94 CONG. REC. 4902, 80th Cong. 2d Sess.

See also Ch. 9, infra, for election contests generally.

2. See the elections committee report in the case, H. REPT. NO. 1823, 80th Cong. 2d Sess. (1948). The Supreme Court later invalidated the use of the "county unit" system. *Gray* v *Sanders,* 372 U.S. 368 (1963).

3. For discussion of state responsibility for congressional districting, see §§ 1, 3, supra.

4. For past and present congressional districting requirements, see § 3, supra.